JUN 20

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-122

CARLO MASTROTOTARO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR REHEARING

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The Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the Petition for Writ of Certiorari entered on June 7, 1972, and (2) granting the Petition. As grounds for this motion, Petitioner states the following:

I. THE CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL.

In the abstract the principle that

> "Witnesses to a crime are not the property of the prosecution or the defense and both sides have an equal right and should have an equal opportunity to interview them."[1]

[1] *Callahan* v. *United States*, 371 F. 2d 658, 660 (9th Cir. 1967); *Gregory* v. *United States*, 125 U.S. App. D.C. 140, 369 F. 2d 185, 188 (1966); *United States* v. *Long*, 449 F. 2d 288 (8th Cir. 1971).

is not questioned by the Petitioner in his Petition for a Writ of Certiorari or the Respondent in its memorandum in opposition. However, the issue presented, stated in its narrowest form, is whether the Court must affirmatively act to insure the availability of all witnesses to both sides in a criminal proceeding. The memorandum of the United States avoids the issue and cites cases which further exemplify the conflict and confusion existing on this principle.

In *United States* v. *Long*, 449 F. 2d 288 (8th Cir. 1971), the Court concluded that

> "... it would have been a better procedure if the trial court had permitted the attorneys for the defense to hear directly from the witness Neal whether he would be willing to talk to the defense attorneys, either alone or in the presence of his attorney."
>
> *Long*, supra at p. 296.

In *United States* v. *Dryden*, 423 F. 2d 1175 (5th Cir. 1970), the witness requested a government officer to prevent the defendant from interviewing him and apparently followed the prosecutor's advice in refusing to talk to the defendant. The trial court ruled and the Court of Appeals affirmed that there was nothing unconstitutional in the government's interference with the defense's opportunity to interview.

In *Gregory* v. *United States*, 369 F. 2d 185 (D.C.Cir. 1966), the Court concluded that equal access and opportunity to interview meant without interference or suggestion and questioned the necessity of the prosecution's suggestion to its witnesses that they not submit to an interview unless the prosecutor were present. *Gregory* is in

direct conflict with *Dryden, supra*, and the ruling in the instant case.

The Petitioner requested to interview the witness Vincent Teresa, who was held in custody by the government, and the court denied this request based merely on the government's assertion that Mr. Teresa did not want to be interviewed. *United States* v. *Long*, 449 F. 2d at p. 296 suggests that the better procedure in the instant case would have been to hear directly from Mr. Teresa whether he wished to be interviewed. *Gregory* and its insistence on equal access to witnesses would necessarily concur. *Dryden*, however, would not.

The United States in its memorandum in response to Petitioner's brief suggests that the Petitioner may have waived his right to such procedure[2] by not requesting it more energetically and further suggests that since the instant proceeding was the second trial (the first ending in mistrial), the Petitioner had more than adequate discovery of the witness's testimony. Both of these arguments miss the issue of whether the court must insure the equal access and opportunity to all witnesses.

For these reasons, therefore, the denial of certiorari should be reconsidered.

II. The Violation Of Principles Of *Michaelson* v. *United States*, 335 U.S. 469, 69 S.Ct. 213 (1948).

The issue presented by Petitioner arises out of a determination by the trial court that testimony regarding Peti-

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[2] See fn. 2, p. 2 Memorandum for the United States in Opposition, *Carlo Mastrototaro, Petitioner* v. *United States of America*, No. 71-1227.

tioner's prior bad acts and associations was admissible. The Court of Appeals held that the trial court's ruling was not an abuse of discretion because even though the challenged testimony amounted to nearly 80% of that presented by the government, there was a sufficient line between it and the crime charged. The Court of Appeals stated: "(W)e do not approve of the *extremely* lavish treatment accorded by the prosecution to some of these matters." (Emphasis added) *United States* v. *Mastrototaro*, 455 F. 2d 802, 804 (4th Cir. 1972).

Thus, the issue becomes defined as how much prejudicial evidence may be admitted before a defendant's right to a fair trial is lost. We submit that this issue requires an analysis which goes beyond that made by the Court of Appeals and the District Court in the instant case. It is not enough to merely establish that each piece of evidence may be admitted under certain exceptions to the general rule of exclusion without viewing the evidence in the aggregate.

Although the admission of one or two of the prejudicial statements may have inflicted only some harm to the Petitioner, once it became apparent that most of the government's case consisted of prior bad acts and associations, the government's argument that background material was needed could not outweigh the accumulated prejudice to the Petitioner. The thrust of the question presented is not whether the trial court was correct in admitting each piece of evidence but whether, as the Court of Appeals described it, ". . .the extremely lavish treatment accorded by the prosecution to some of these matters." *Mastrototaro, supra*, required a reversal.

The Court of Appeals stated:

> "In the process of proving the charge, other offenses may sometimes come to light incidentally, but when the prosecution devotes excessive trial time to this type of 'background' material, it runs the risk of trespassing into the impermissible area and jeopardizing any resulting conviction."
>
> *Mastrototaro, supra,* at p. 804.

We agree with this statement presented by the Court of Appeals but submit that that court only paid lip service to it since the Court's opinion concludes by upholding the admission of each piece of evidence based on a link between the evidence and the crime charged.

We submit that the proper analysis for the admission of concededly prejudicial evidence is to view it from two perspectives:

(1) from its effect at the initial point of its offering; and
(2) from its effect on the trial as a whole.

Therefore, at some point during the course of the trial the District Court erred in not sustaining the Petitioner's objections and allowing his motions to strike testimony relating to prior bad acts and associations.

The Petitioner was convicted by evidence attacking his character which had been admitted by the trial court contrary to the spirit of *Michaelson* v. *United States*, 335 U.S. 469, 69 S. Ct. 213 (1948) and this fact calls for a re-evaluation of the denial of certiorari and to permit Petitioner's conviction to be appraised without the prejudicial attacks on his character and associations.

Conclusion

For the reasons set forth above as well as those contained in the Petition for Writ of Certiorari, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

JOSEPH J. BALLIRO
Counsel for the Petitioner

CERTIFICATE OF SERVICE

As counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

Counsel for Petitioner